

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 22, 1998
Case No: 98-INA-131

In the Matter of:

FRANCO WOOD CRAFTING, INC.
Employer

On Behalf of:

HUMBERTO FLOREZ
Alien

Certifying Officer: Delores Dehaan
New York, N.Y.

Before: Holmes, Vittone and Wood
Administrative Law Judges

John C. Holmes
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. § 656.26 (1995) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to the Immigration and Nationality Act of 1990 ("Act"). 8 U.S.C. § 1182(a)(5) (1990). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the act, 8 U.S.C. § 1182(a)(5) (1990), and Title 20, Part 656 of the Code of Federal Regulations ("Regulations"). Unless otherwise noted, all the regulations cited in this decision refer to Title 20.

Under the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On July 24, 1995, Franco Wood Crafting, Inc. ("Employer") made an application to gain alien labor certification for Humberto Florez ("Mr. Florez") in the position of Antique Furniture Crafter. The minimum experience required of any applicant was two years. There was no minimum educational requirement. The duties and responsibilities of the position were as follows:

Finish damaged or used wood furniture. Remove old finish from surfaces using steel wool, sandpaper. Disassembles articles, applies plastic putty, lacquer; stick to surface using spatula to fill nicks, holes, cracks; cutting wood, turning wood, finish formica.

(AF 62). The ETA 750A did not mention that a prospective employee had to take and pass a performance test to demonstrate competency for the position. Nevertheless, Employer administered a performance test to all the potential employees. The test required applicants to use a lathe machine to recreate a sample piece of furniture.

The Certifying Officer ("CO") issued a Notice of Findings ("NOF") on August 19, 1997. (AF 68). The NOF proposed to deny Employer's application for certification because the CO found that six U.S. applicants may have been unlawfully rejected. In so doing, Employer used an undisclosed performance test to evaluate U.S. applicants. The CO stated:

While we do not, in general, object to a testing requirement for positions where a test is meaningful, employer did not establish that a 'no notice' test is normal practice in the employer's industry, that the alien and all other workers employed in this [and] in 'like' positions, were required to take and did [pass] this same test as a condition of hire and the criteria used by employer in determining whether an individual passes or fails the test.

(AF 68). The CO required that Employer present documentation of specific lawful job-related reasons for rejection of each applicant. With respect to the test requirement, Employer must document it as a business necessity under 656.21(b)(2)(i).

The Employer's rebuttal, dated September 22, 1997, offered a number of reasons for the use of a performance test. (AF 63-65). Employer claimed that the test was necessary to

¹ All further references to documents contained in the Appeal File will be noted as "AF."

determine the ability of a prospective employee since much of their business involved expensive pieces of furniture that would be ruined in the hands of unskilled or inexperienced workers. Employer argued that the lathe machine was the best way to determine an applicant's level of competence. The rebuttal did not mention the criterion that was used to determine what was necessary to pass or fail the test or whether other employees had to pass a test prior to employment.

In the Final Determination, dated October 2, 1997, the CO accepted the rejection of five of the six U.S. applicants. However, the CO found that the Rebuttal failed to establish a business necessity, thus rendering the performance test restrictive, with respect to applicant David McLeod, Sr. (AF 55-57).

By letter, dated October 29, 1997, Employer has made a timely request for review before this Board on the issue of its use of a performance test to evaluate potential employees. (AF 75-77).

DISCUSSION

Performance tests are not per se unlawful. However, considering the likelihood for abuse of such tests, an employer must document, in detail, its reasons for the rejection of U.S. applicants based on a test. Lee & Family Leather Fashions, 93-INA-50 (Dec. 21, 1998).

In Lee, the employer had administered a test to U.S. candidates that was intended to determine their ability to make sample leather handbags. As here, the CO in Lee denied certification based on the use of the performance test since the employer could not demonstrate that the test was not “. . . excessive, restrictive or unrealistic.”

The Board found in Lee that a pre-employment questionnaire or test may be used to determine whether the applicant had the proper experience for the job. See also Sentient Sys., Inc., 94-INA-59 (Jan. 23, 1996); Mitco, 90-INA-295 (Sept. 11, 1991); Northwood Unocal 76, 89-INA-189 (July 9, 1991); South of France Restaurant, 89-INA-68 (Feb. 26, 1990); Allied Towing Serv., 88-INA-46 (Jan. 9, 1989). However, due to the potential for misuse of such tests, they are “. . . suspect and must be supported by specific facts which are sufficient to provide an objective, detailed, basis for concluding that the applicant could not perform the core job duties.” Lee, 93-INA-50.

In the instant matter, the employer maintained that it may test applicants to determine their abilities so that it will not have to sacrifice productivity or service. We have no quarrel with this logic. As discussed, many of our previous decisions have acknowledged the usefulness of performance tests in evaluating applicants, and we keep in line with those holdings. The issue in this case is primarily the failure to validate the test, not in the use of a test. The CO requested specific information regarding the criteria used to determine what constituted a passing or failing score and whether or not other employees, including the alien, were required to take this test

prior to employment. None of these questions were answered in the rebuttal. This information was necessary to insure that the test was not being used as a tool to unlawfully disqualify U.S. applicants. Employer's statement, that the test was necessary to prevent the destruction of precious furniture by unskilled employees or that the lathe machine was the best way to establish an applicant's qualifications, was not sufficient, without more, to satisfy this requirement. See, e.g., Northwood Unocal 76, 89-INA-189 (July 9, 1989) (denial was reversed where the employer demonstrated that all of its previous employees, including the alien, were required to take and pass the test before employment). Since Employer failed to provide the information necessary to evaluate the appropriateness of the test, the CO justifiably denied certification.

ORDER

For the foregoing reasons, the Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel

John C. Holmes
Administrative Law Judge